No. 85789-0
Consolidated with No. 85947–7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ENRIQUE GUZMAN NUNEZ,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR DOUGLAS COUNTY

The Honorable John Hotchkiss

SUPPLEMENTAL BRIEF OF PETITIONER

THOMAS M. KUMMEROW
JAN TRASEN
Attorneys for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

RULES

A. ISSUES PRESENTED FOR REVIEW

1. Whether an error under this Court's decision in *State v. Bashaw,* 169 Wn.2d 133, 234 P.3d 195 (2010), may be raised for the first time on appeal where the error is the imposition of an enhanced sentence which is the result of an erroneous jury instruction on juror unanimity?

2. Whether an error under *Bashaw* can ever be harmless where the jury's answer on the special verdict was the result of a "flawed deliberative process" resulting from an erroneous jury instruction on unanimity for the special verdict?

B. STATEMENT OF THE CASE

After a jury trial, Enrique Nunez was convicted of delivery of cocaine (Count I) and possession of cocaine with intent to deliver (Count II). 7/1/09 RP 282-83. On each count, the jury returned a special verdict, finding that each of the offenses occurred within 1000 feet of a school bus route zone or school zone. CP 35-36; 7/1/09 RP 283-84. CP 21-23, 53; 3RP 122.

The jury instruction for the special verdict forms for Counts I and II required the jury to answer "yes" or "no" to the question, "Did the defendant possess (or deliver) a controlled substance with the intent to manufacture or deliver within one thousand feet of a

school bus route stop designated by a school district?" CP 35-36. The trial court informed the jury that its decision had to be unanimous in order to answer either "yes" or "no" to the question. CP 30; 7/1/09 RP 256. The court's concluding instruction concerning the special verdict forms read:

> You will also be given special verdict forms for the crimes charged in Count I and Count II. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. *Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms.* In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. *If you unanimously have a reasonable doubt as to this question, you must answer "no."*

CP 30 (emphasis added); 7/1/09 RP 256. The jury answered "yes" on the special verdict form following deliberations.

Mr. Nunez's standard range sentence for both offenses was 12 to 20 months. CP 42; 7/13/09 RP 297-98. In imposing the sentence, the trial court added an additional 24 months for the sentence enhancement on Count II, and dismissed the special verdict on Count I. CP 42; 7/13/09 RP 297-98.

Among the issues raised on appeal before Division Three of the Court of Appeals, Mr. Nunez contended his sentence on the special verdict must be reversed in light of the erroneous jury instruction regarding unanimity in the special verdict based upon this Court's ruling in *Bashaw, supra*. In a published opinion, Division Three refused to address the issue, finding that the error was not a manifest constitutional error that may be raised for the first time on appeal under RAP 2.5(a) because Mr. Nunez did not object at trial. *State v. Nunez,* 160 Wn.App. 150, 159-65, 248 P.3d 103 (2011), *review granted*, 172 Wn.2d 1004 (2011).

After the opinion in *Nunez* was issued, Division One of the Court of Appeals issued its decision in *State v. Ryan,* 160 Wn.App. 944, 252 P.3d 895, *review granted,* 172 Wn.2d 1004 (2011). *Ryan* involved the same erroneous special verdict instruction and, as in *Nunez*, the defendant did not object at trial. Nevertheless, Division One, while noting Division Three's decision in *Nunez* and specifically disagreeing with it, ruled this Court's decision in *Bashaw* was grounded in due process, thus the issue was a manifest constitutional error which could be raised for the first time

on appeal under RAP 2.5(a). 160 Wn.App. at 948-49.[1] Following *Bashaw*, the Court found the error not harmless and reversed the sentence imposed pursuant to the special verdict. *Id.*

C. ARGUMENT

THE IMPOSITION OF AN ENHANCED SENTENCE BASED UPON A FAULTY UNANIMITY JURY INSTRUCTION PURSUANT TO *STATE v. BASHAW* MUST RESULT IN THE ENHANCED SENTENCE BEING STRICKEN AND THE MATTER REMANDED FOR RESENTENCING

In *Bashaw,* the State sought a sentence enhancement for delivering a controlled substance within 1000 feet of a school bus route stop. In the jury instruction on the special verdict, the jurors were instructed:

> Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.

Bashaw, 169 Wn.2d at 198. Mr. Bashaw did not object to the instruction nor did he object to the imposition of the enhanced sentence based upon the jury's finding on the special verdict.

Relying upon its decision in *State v. Goldberg,* 149 Wn.2d 888, 72 P.3d 1083 (2003),[2] this Court ruled:

---

[1] In disagreeing with Division Three, Division One acknowledged the decision and noted: "We reach the opposite conclusion." 160 Wn.App. at 948.

[2] In *Goldberg,* upon discovering that jurors were not unanimous in answering "no" to a special verdict question, the trial court ordered the jurors to

> [T]he jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the *presence* of a special finding increasing the maximum penalty, it is not required to find the *absence* of such a special finding. The jury instruction here stated that unanimity was required for that determination. That was error.

Id. at 147 (italics in original, internal citation omitted).

Applying the constitutional harmless error standard from *State v. Brown,* 147 Wn.2d 330, 58 P.3d 889 (2002),[3] this Court concluded the error was not harmless, and essentially could never be harmless:

> The State argues, and the Court of Appeals agreed, that any error in the instruction was harmless because the trial court polled the jury and the jurors affirmed the verdict, demonstrating it was unanimous. This argument misses the point. The error here was procedure by which unanimity would be inappropriately achieved.
>
> . . .
>
> The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction . . . We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

---

resume deliberations until they reached unanimity. *Id.* at 891. The Supreme Court concluded that the trial court erred in doing so, holding that jury unanimity is not required to answer "no" to a special verdict. *Id.* at 894.

[3] Under this standard, this Court "must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Brown,* 147 Wn.2d at 341, *quoting Neder v. United States,* 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

Bashaw, 169 Wn.2d at 147.

1. The error can be raised for the first time on appeal. While Mr. Nunez did not object to Court's Instruction 13, neither did the defendants in either *Goldberg* or *Bashaw*. Nevertheless, this Court addressed the issue and vacated the special finding and the enhanced sentence based upon the improper instruction. *Bashaw,* 169 Wn.2d at 146-47; *Goldberg*, 149 Wn.2d at 892-94. The Court of Appeals in *Ryan* did as well, finding the error one of due process, thus one of constitutional magnitude. *Ryan,* 160 Wn.App. at 949. Under *Goldberg, Bashaw,* and *Ryan,* Mr. Nunez may raise this issue for the first time on appeal.

More to the point, the error occurred not merely in the use of the invalid instruction, but when the trial court imposed the sentence enhancement based upon the invalid special verdict which in return was derived from the erroneous jury instruction. This Court has held that a sentence enhancement must be authorized by a valid jury special verdict. *State v. Williams-Walker,* 167 Wn.2d 889, 900, 225 P.3d 913 (2010). As a consequence, this Court has concluded that a manifest constitutional error occurs when the trial court imposes a sentence enhancement not

authorized by a valid jury verdict. *See State v. Recuenco,* 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (the error in imposing a firearm enhancement, where the jury found only a deadly weapon, occurred during sentencing and not in the jury's determination of guilt).

The end result is that "illegal or erroneous sentences may be challenged for the first time on appeal," regardless of whether defense counsel registered a proper objection before the trial court. *State v. Ross,* 152 Wn.2d 220, 229, 95 P.3d 1225 (2004), *quoting State v. Ford,* 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Thus, Mr. Nunez may raise this issue for the first time on appeal because it ultimately involves the imposition of an invalid sentence.

2. The flawed unanimity instruction here was identical to that utilized in *Bashaw* and was equally erroneous. The right to a jury trial includes the right to have each juror reach his or her own verdict uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel. *State v. Boogaard,* 90 Wn.2d 733, 736, 585 P.2d 789 (1978). The Washington Constitution requires unanimous jury verdicts in criminal cases. Art. I, § 21; *State v. Stephens,* 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Regarding special verdicts, the jury must be

unanimous to find the State has proven the special finding beyond a reasonable doubt. *Goldberg*, 149 Wn.2d at 892-93. But, this Court has held that the jury does not have to be unanimous to find that the State had not proven the special finding beyond a reasonable doubt. *Bashaw,* 169 Wn.2d at 146.

This Court has held that jury unanimity is not required to answer "no" to a special verdict question. *Goldberg,* 149 Wn.2d at 894. In *Goldberg,* upon discovering that jurors were not unanimous in answering "no" to a special verdict question, the trial court ordered the jurors to resume deliberations until they reached unanimity. *Id.* at 891. This Court concluded that the trial court erred in doing so, holding that jury unanimity is not required to answer "no" to a special verdict. *Id.* at 894.

Subsequently, in *Bashaw,* the trial court instructed the jury in precisely the same manner regarding the special verdict: "[s]ince this is a criminal case, all twelve of you must agree on the answer to the special verdict." 169 Wn.2d at 139. This Court in *Bashaw* found the instruction an incorrect statement of the law and ordered the special verdict stricken:

> Applying the *Goldberg* rule to the present case, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect

> statement of the law. Though unanimity is required to find the *presence* of the special finding increasing the maximum penalty, [citation omitted], it is not required to find the *absence* of such a finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Bashaw, 169 Wn.2d at 147 (emphasis added).

The requirement of jury unanimity for sentence enhancements under RCW 9.94A.537(3) does not change the result. RCW 9.94A.537(3) states in relevant part:

> The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory.

This is the same standard of proof beyond a reasonable doubt required for the jury to find aggravating factors for aggravated first degree murder under RCW 10.95.020, as in *Goldberg*. *Goldberg*, 149 Wn.2d at 893-94. Thus, there is nothing in RCW 9.94A.537(3) that alters the result compelled by *Bashaw* and *Goldberg*.

The identical instruction used in *Bashaw* was used here. As in *Bashaw*, this was error.

3. Under *Bashaw*, this Court concluded that the error can never be harmless. In *Bashaw*, this Court ruled an error in the unanimity instruction for a special verdict can essentially never be harmless even where as in *Bashaw*, the jury was polled and the jurors uniformly affirmed their verdict:

> This argument misses the point. The error here was the *procedure* by which unanimity would be inappropriately achieved.
>
> . . .
>
> The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction . . . We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

Id. at 147-48 (emphasis added).

It is the flawed deliberative process that is the problem, not the quantum of evidence, which fails to allow this Court to "say with confidence what might have occurred" had the proper instruction been given. Thus, under *Bashaw*, the simple use here of the improper instruction by the trial court was error, and was not harmless since it is impossible to determine what would have occurred had the jury been properly instructed. The error here was not harmless.

4. The remedy is reversal of the sentence for the enhancement and dismissal of the enhancement. In *Williams-Walker, supra,* this Court held that a firearm enhancement is not an element of the offense but a sentencing factor, and the remedy for an improper firearm enhancement finding by the jury is to reverse the sentence and strike the enhancement. 167 Wn.2d at 899-902.

Here, the trial court's error in imposing the school zone enhancement, without a *valid* special verdict to support it, occurred when the trial court imposed the sentence for the enhancement. *See Recuenco,* 163 Wn.2d at 440. Thus, the remedy for an improper special verdict is to strike the enhancement, not remand for a new trial. *Williams-Walker,* 167 Wn.2d at 899-900; *Recuenco,* 163 Wn.2d at 441-42.

Mr. Nunez requests this Court vacate the school zone enhancement and remand for resentencing.

5. Principles of judicial economy and fiscal restraint compel adhering to the holdings of *Goldberg* and *Bashaw*. To follow the State's argument and require juries to be unanimous to answer "no" to a special verdict question would result in retrials merely for the jury to again determine aggravating factors, even where the jury has returned a guilty verdict on the underlying substantive offense.

Essentially, the "tail wagging the dog." This would clog the trial courts with unwarranted and unneeded trials merely to allow the State to seek an exceptional sentence where it did not carry its burden of proof with the first jury. In today's times of budgetary constraints on the State and counties and calls for fiscal restraint, such needless expenditures appear to be a waste of scarce judicial resources and of the taxpayers' money. This cannot be a result either the Legislature or this Court contemplated.

Generally, the Legislature is constitutionally vested with the authority to decide whether a particular fact is an element of the crime or merely relevant to sentencing. *Harris v. United States,* 536 U.S. 545, 550, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002); *State v. Evans,* 154 Wn.2d 438, 447, 114 P.3d 627 (2005). When it enacted RCW 9.94A.537, the Legislature specifically stated its intention to "create a *new criminal procedure* for imposing greater punishment than the standard range or conditions and to codify existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances." Laws of 2005, ch. 68, § 1 (emphasis added); *State v. Hylton,* 154 Wn.App. 945, 952-53, 226 P.3d 246 (2010). The Legislature has determined that an aggravating factor is "decidedly

not an element" of the underlying offense. *State v. Roswell,* 165 Wn.2d 186, 194, 196 P.3d 705 (2008); *State v. Langstead*, 155 Wn.App. 448, 455, 228 P.3d 799 (2010).

Thus, in enacting RCW 9.94A.537, the Legislature intended to treat aggravating factors differently than the elements of the underlying offense, as long as the aggravating factor was presented to the jury and found beyond a reasonable doubt. RCW 9.94A.537 requires the jury be unanimous to find the aggravating factor but is silent as to the procedure when the jury is deadlocked. To slavishly follow the State's argument "would disturb the carefully crafted legislative procedure separating consideration of guilt from the penalty phase." *State v. Mills,* 154 Wn.2d 1, 9-10, 109 P.3d 415 (2005).

Compelling public policy regarding the expenditure of the scarce public and judicial resources and supports this Court's decisions in *Goldberg* and *Bashaw* ruling that a jury's "no" answer to a special verdict need not be unanimous. This Court should adhere to those holdings and reject the State's argument to the contrary.

D CONCLUSION

For the reasons stated, Mr. Nunez asks this Court to vacate his enhanced sentence and remand for resentencing.

DATED this 7th day of October 2011.

Respectfully submitted,

THOMAS M. KUMMEROW (WSBA 21518)
JAN TRASEN (WSBA 41177)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 85789-0
	)	
ENRIQUE NUNEZ,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, JOSEPH ALVARADO, STATE THAT ON THE 7TH DAY OF OCTOBER, 2011, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ERIC C. BIGGAR DOUGLAS COUNTY PROSECUTORS OFFICE PO BOX 360 WATERVILLE WA 98858-0360	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] BRIAN MCDONALD, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] CHRISTOPHER GIBSON ATTORNEY AT LAW NIELSEN BROMAN KOCH, PLLC 1908 E MADISON ST SEATTLE, WA 98122	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF OCTOBER, 2011.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710